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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSHUA JAY LEHMAN,

Defendant and Appellant.

C059495

(Super. Ct. No. 08F00792)

A jury found defendant Joshua Jay Lehman guilty of failing to register as a sex offender, and the trial court found he had a prior strike. The trial court also found, based on the trial evidence, that defendant had violated his probation in a prior case. The trial court sentenced defendant to prison for two years for failing to register as a sex offender, doubled to four years for the strike, and imposed a concurrent two-year term for the prior case in which probation was revoked. Defendant timely appealed.

On appeal, defendant contends no substantial evidence supports the conviction, the trial court misinstructed the jury,

and the statute under which he stands convicted is void for vagueness. We shall affirm.

FACTS

Defendant was charged with violating the requirement that within five working days of moving to another jurisdiction, a sex registrant must in person notify the authorities in the place he or she last registered of the new address, if known. (Pen. Code,¹ § 290.013, subd. (a).)

Misty Roskie, a Yuba County Sheriff Office dispatcher, moved into a house in Olivehurst on November 1, 2007, with her boyfriend, Angel Cuevas, and her children.² That month, Alona Bush, Bush's children, and defendant, Bush's boyfriend, moved in with Roskie. Bush and defendant had been living in a garage on Robert Way in Sacramento, and Roskie had visited them there. Roskie and Cuevas drove to Sacramento on November 17 to move Bush and defendant, and saw that they were packing boxes. The group rented a U-Haul truck, packed it with "all" of defendant's and Bush's things, drove to Roskie's Olivehurst house, and unpacked.

Between November 17 and November 27, defendant spent one night away, otherwise he slept in Roskie's living room. Roskie was told defendant spent that one night in Sacramento, but she did not testify that she was told where in Sacramento he stayed.

¹ All further statutory references are to the Penal Code.

² Unspecified dates are in 2007.

Roskie knew defendant stayed at her house the other nights because she worked a late shift and had a baby she was feeding, which kept her up late.

About a week after defendant moved in, Roskie overheard him on the telephone telling someone "This is no longer Jay's phone," and then defendant called someone and said "if my probation officer comes over there, tell him I moved to Oregon." Roskie reported the call to her sergeant on her next shift because of her job in law enforcement and her knowledge that defendant was a sex registrant. She had not been paying much attention to defendant "until the conversation started happening."

Detective Paul Schindler was assigned to the sexual assault felony enforcement team of the Sacramento Police Department. He testified about how sex offenders must fill out their registration forms. He described defendant's last arrest was for failure to register when he moved away from a registered address in 2006, then claimed to be moving to Oregon, and said he lived in his car.

Defendant registered as a sex offender eight different times. Detective Schindler reviewed a statewide database and determined that defendant last registered on October 10. Registration changes are entered into that system within a day or two. Detective Schindler was later asked if he had determined whether there were any registration events between November 16 and November 28, and he answered that he had not found any.

The address defendant had registered on October 10 was on Robert Way in Sacramento. The registration form defendant filled out contains a number of acknowledgements on the back, describing the various registration duties, each of which defendant initialed.

On November 21, Detective Schindler went with other officers to the Robert Way address to serve a no-bail warrant based on defendant's failure to complete work project requirements. He was not there. The garage contained 10 to 12 unsealed boxes. Detective Schindler checked a couple of the boxes but saw nothing to indicate they belonged to defendant. Defendant's former roommate, Jennifer Smith, told the detective that defendant had moved out within the past few days.

During Detective Schindler's testimony, the trial court instructed the jurors on part of the sex offender registration law in order to help them understand some of the testimony.³

³ The trial court instructed in part that "any person who was last registered at a residence address pursuant to the act who changes his or her residence address, whether within the jurisdiction in which he or she is currently registered or to a new jurisdiction inside or outside of the state, shall in-person within five working days of the move inform the law enforcement agency or agencies with which he or she last registered of the move, the new address or transient location, if known, and any plans he or she has to return to California. [¶] In somewhat more plain language what is required to return a guilty verdict in the case along with other things is that the Prosecution has proved beyond a reasonable doubt that the defendant actually knew he had a duty to notify the law enforcement agency where he was last registered of any new address or location, whether inside or outside California, and that he willfully failed to

Detective Schindler then testified that the form defendant had filled out on October 10 did not correctly reflect the statutory requirements in one respect: Although the form states a registrant must notify the agency *before* he leaves the jurisdiction, the statute requires the registrant to notify the agency within five days of leaving.⁴ Still later during Detective Schindler's testimony, the trial court instructed on "concurrent" or multiple registration.⁵

A U-Haul employee testified Cuevas rented a truck on November 17 in Sacramento and it was returned on November 19 in Yuba City.

Yuba County Sheriff Detective Joseph Pomeroy testified that on the morning of November 26, he spoke to Roskie about defendant's telephone calls of November 24. "The first thing that caught her attention was his phrase of 'This is not Jay's phone anymore.'" Then, "She heard him use the name Jennifer,

notify the law enforcement agency with whom he last registered in-person within five days of the move."

⁴ The form provides in relevant part: "If I change my registered address to a new address . . . I must inform the last registering agency or agencies in person within five (5) working days before I leave."

⁵ The court instructed: "If the person who is registering has more than one residence address at which he or she regularly resides he or she shall register in accordance with the act from each of the jurisdictions in which he or she regularly resides regardless of the number of days or nights spent there. [¶] If all the addresses are within the same jurisdiction the person shall provide the registered authority with all of the addresses where he or she regularly resides." This instruction was taken from Penal Code section 290.010.

and he was speaking in a tone which indicated that he was arguing with the person on the other end of the phone and said that he was moving to Oregon and to tell his parole officer that he was moving to Oregon." Detective Pomeroy arrested defendant two days later, on November 28, at a Wal-Mart in Linda.⁶

Claude Noble, a probation officer, met with defendant on September 24, as he was moving to Sacramento from Marysville with his girlfriend. Noble advised defendant of the sex offender laws and ordered defendant to tell Noble within 48 hours if he moved, because "He had a history of failing to register." "I explained to him that if his address changes, he needs to notify me within 48 hours, and he needs to notify the SAFE team of his change of address within five days." Noble repeated that information and admonition to defendant on October 11 and October 15, in person. On November 21, Noble went to Robert Way because defendant had failed to report to probation and had a warrant out for failure to complete his work project requirements arising from the 2006 case. The belongings that had been in the garage before were gone, though there were still some boxes in the garage.

Alona Bush first testified that she and defendant did not fully move out of the Robert Way house until after Thanksgiving,

⁶ Yuba County charges against defendant for failing to register in that jurisdiction were dismissed, apparently because the Yuba County office in which to register is not open every day, and defendant's time in which to notify the incoming jurisdiction of his change of address had not expired as of the date of his arrest.

but later explained that she was not sure of the date, but was sure that they moved out whatever date they rented the U-Haul, and that Olivehurst was defendant's "primary" residence after the U-Haul move. A dresser and some other things were left behind in the Robert Way garage. Defendant stayed in Olivehurst except a few times when they argued and he went elsewhere, but Bush did *not* testify defendant went to Robert Way those times.

Jennifer Smith testified defendant and Bush moved in around October 1, and moved out shortly before Thanksgiving. All they left was an empty dresser and a few small items; the boxes still in the garage were not theirs. Contrary to Bush's testimony, Smith testified they did not pay rent for December. After the U-Haul move, they did not have a key, defendant never came back to sleep there and to Smith's knowledge, defendant never returned in her absence to pick anything up.

The parties stipulated that defendant had been convicted of failure to register on September 17, 2007, "involving conduct from June and July of 2006 as described in Detective Schindler's testimony." Being required to register due to a conviction for spousal rape, defendant "willfully . . . failed to inform the law enforcement agency with whom the defendant last registered in writing of the defendant's new address and location within five working days . . . of the defendant's change of address and location."

During argument, defense counsel told the jury that he had decided *not* to argue a "dual" or multiple residence defense.

DISCUSSION

I

Substantial Evidence Supports The Conviction

Defendant contends no substantial evidence supports his conviction. He argues he was arrested *before* his period in which to comply expired. The defense argued the move was not *complete* until the U-Haul was returned on November 19, which began the five working day clock. November 22 and 23 were legal holidays (Thanksgiving and the Friday after Thanksgiving), and November 24 and 25 were weekend days. Defendant was arrested on the *morning* of November 28, the fifth working day after the move (as defined by defense counsel's argument), but because the truck had been returned on the *afternoon* of November 19, there was still time for defendant to comply with the law. The People's theory is that defendant moved away from the Robert Way address on November 17 and moved into the Olivehurst address, triggering a duty on his part to notify the Sacramento authorities within five working days of his move.

"It is axiomatic that substantial evidence includes all reasonable inferences that may be drawn from the evidence, and that in reviewing the sufficiency of the evidence this court must draw all reasonable inferences in support to the judgment, 'presume . . . the existence of every fact the trier could reasonably deduce from the evidence,' and may not reweigh the evidence." (*People v. Annin* (2004) 117 Cal.App.4th 591, 601.)

The trial court instructed the jury on the elements of the charged crime, adapting CALCRIM No. 1170 to fit the specifics of

this case, as follows: 1) defendant had a prior qualifying conviction (a fact stipulated by the parties); 2) he changed his residence to Olivehurst; 3) he actually knew he had a duty to notify the prior law enforcement agency of the "new address or location^[7]"; and 4) he willfully failed to notify that agency "within five working days of the move."

In part, defendant's claim hinges on his interpretation of the effect of the mistake on the registration form defendant signed on October 10. To repeat, the statute -- and instructions -- required defendant to notify the agency with which he had last registered "within" five days of the move, but the last form defendant completed stated that he was required to notify that agency within five days *before* he moved. (See fn. 3.)

Defendant was not charged with violating the terms of the registration form, he was charged with violating the terms of the statute. It is the statute that defines the elements of the crime charged. The trial court correctly instructed the jury on the elements of the crime, as applicable to this case. (See part II, *post*.) In particular, the jury was instructed that the People had to prove defendant did not register "within five working days of the move." The mistaken registration form does not change this element of the crime.

⁷ The statute reads "transient location" and that is the language the trial court used when it instructed the jury mid-trial. (See fns. 3 & 9.) The difference is not material here.

Detective Schindler testified there is a statewide database in which sex offender forms are entered within a day or two. He checked that database and learned that defendant had last registered on October 10, over a month before the move. From that evidence, the jury could infer that defendant did not file the requisite registration form with the prior agency.

Defendant, noting that he could have complied with the duty to notify "within" five days of the move by filing a form *before or after* the move, contends Detective Schindler did not check whether he had registered five days *before* the move. This contention does not view the evidence in the light favorable to the jury's verdict. It is correct that Detective Schindler answered a specific question whether he had checked "Between November 16th of 2007 and November 28th of 2007," and that he answered that he could not find any registration events in that period. But this does not undermine his testimony that he checked the database and learned that *the last registration event* was on October 10. That shows defendant did not file any forms for over a month before the move and never gave notice of the move to Olivehurst.

Defendant also contends that there is no evidence he *knew* what his new address was. We disagree. He moved into Roskie's house in Olivehurst. The jury could rationally infer that defendant knew the address. The People were not required to prove defendant had looked at the numbers on the house or sidewalk to prove that he knew the address.

Defendant also contends there was no evidence of his actual knowledge of the duty to register. Defendant had previously been convicted of this same offense, not telling the last agency of a move, and the trial court instructed the jury that it could use that conviction as evidence of defendant's knowledge of his registration duties. Further, defendant's probation officer testified he *repeatedly and in person* told defendant of his duties. Finally, defendant evidenced consciousness of guilt by telling "Jennifer" -- presumably, Jennifer Smith -- to lie to the authorities and tell them he had moved to Oregon. From all of this evidence, the jury could find defendant knew his duty. Although the last registration form defendant signed may have misstated his duty by narrowing the window in which he had to register (from "within" five days of the move to "before" the move), that does not undermine the other evidence that he knew his duty to tell the last agency of his new address.

Finally, defendant contends no substantial evidence shows he willfully failed to notify the past agency of his new address. Viewed in the light favorable to the verdict, defendant knew of the registration duty, had the ability to comply, as he had done before, had a prior conviction for the same offense, and he asked "Jennifer" to say he moved to Oregon. From these facts, the jury could infer defendant willfully failed to notify the past agency of his new address.

In the reply brief defendant references a former statute that allowed changes of address to be mailed, and argues the People did not prove he did not mail a change of address. (See

People v. Smith (2004) 32 Cal.4th 792, 797-801.) But defendant was not charged with violating that former statute, and the statute at issue required him to make his notification in person. (Pen. Code, § 290.013, subd. (a).)

II

The Trial Court Properly Instructed The Jury

Defendant contends the trial court misinstructed the jury in three separate respects. We disagree with each claim.

A

No Instruction On Multiple Residences Was Warranted

Defendant contends the trial court should have instructed on the law regarding concurrent or multiple residences, namely, that if defendant began living in Olivehurst but had not stopped living in Sacramento, he was not required to provide an outgoing notification to the Sacramento authorities, only an incoming registration to Yuba County.⁸

A jury must be instructed on theories that are supported by the evidence. (See, e.g., *People v. Shelmire* (2005) 130 Cal.App.4th 1044, 1054-1055, 1058-1059.) Defendant contends the trial court should have reinstructed the jury on multiple

⁸ As stated, although the trial court initially instructed the jury on this theory (see fn. 5), defense counsel later told the jury he would *not* press that theory. Arguably, the instructional claim on appeal is barred by the invited error doctrine. (5 Witkin & Epstein, Cal. Crim. Law (3d ed. 2000) Criminal Trial, § 663, p. 954; see *People v. Catlin* (2001) 26 Cal.4th 81, 150.) But because the People do not argue invited error, we proceed to the merits of the claim.

residences at the end of the case because there was evidence he still lived on Robert Way. We disagree.

There was no testimony that defendant continued to live in the Robert Way garage in Sacramento after the U-Haul move. Roskie testified defendant slept in Olivehurst all but one night. She did not testify defendant slept at Robert Way that night. Bush testified defendant stayed in Olivehurst except when they were fighting, but she did *not* testify defendant stayed at Robert Way those times. Smith testified defendant and Bush moved all but a few of their things out, and defendant never returned. Thus, there was *no* testimony that defendant slept at Robert Way after the U-Haul move.

Appellate counsel states "Bush believed that appellant stayed at the Smith home [on Robert Way] occasionally after the move." The record citation supplied does not support this. Bush was asked whether defendant had ever stayed *inside* Jennifer Smith's house, as opposed to *in the garage*. Bush testified defendant may have slept on the couch in the Smith house. But this part of her testimony was not related to the period *after* the move to Olivehurst.

Because there was no evidence that defendant was living at both the Robert Way and Olivehurst addresses after the U-Haul move, there was no factual conflict for the jury to resolve regarding concurrent or multiple residences and no need to instruct the jury on that theory.

B

The Trial Court Properly Identified The Charged Offense

Defendant contends the trial court, in the instructions, should not have referred to the crime charged as a "failure to register." Defendant had registered as a sex offender, but allegedly did not notify the prior agency of a change of address, therefore, in defendant's view, characterizing the crime charged as a failure to register was prejudicial error. We disagree with this contention.

Sex registrants have a number of discrete duties and it is common to refer to the breach of any of those duties as a failure to register. (See, e.g., *People v. Annin*, *supra*, 117 Cal.App.4th at p. 595, fn. 2 [trial witnesses referred to change of address notice as "'registration' or 're-registration.' The duty to notify of a change in address or location is indeed one of the obligations of a registered sex offender However, for the sake of clarity, we shall refer to this obligation as the 'duty to notify'"].) The jury heard undisputed evidence that defendant had registered eight times and was correctly instructed on the specific notification duty defendant allegedly breached. The jury would not have been led astray by the trial court's shorthand and innocuous description of the crime charged as a failure to register.

C

No Instruction On Address Knowledge Was Required

Noting that subdivision (a) of Penal Code section 290.013 applies when the moving sex registrant knows her or his

destination address, and subdivision (b) applies when a new address is not known at the time of the move, defendant contends the trial court failed to instruct the jury that it had to find defendant knew the address to which he was moving in order to convict him. We disagree.

The trial court instructed the jury that it would have to find beyond a reasonable doubt that defendant "changed his residence" to Olivehurst, and that "defendant actually knew he had a duty to notify the law enforcement agency where he was last registered of any new address or location." The jury would understand that defendant was charged with moving to a specific new address, and there was no dispute that defendant was moving to Roskie's house. Accordingly, there was no factual issue to resolve necessitating a separate instruction on lack of knowledge of the address.

III

The Statute Is Not Void For Vagueness

Defendant contends that the statute under which he stands convicted is void for vagueness.⁹ We disagree.

⁹ Penal Code section 290.013 provides in relevant part:

"(a) Any person who was last registered at a residence address pursuant to the Act who changes his or her residence address, whether within the jurisdiction in which he or she is currently registered or to a new jurisdiction inside or outside the state, shall, in person, within five working days of the move, inform the law enforcement agency or agencies with which he or she last registered of the move, the new address or transient location, if known, and any plans he or she has to return to California.

Generally, a penal statute is impermissibly vague when a person of ordinary intelligence cannot determine what it commands or proscribes; in particular, a mandatory registration statute "must give *clear notice* to all registrants of their responsibilities so that laypersons such as defendant can readily understand and properly discharge them." (*People v. Franklin* (1999) 20 Cal.4th 249, 253-254.)

Defendant observes that a registrant who "changes" his or her address must notify the last registering agency in person, within five working days. (Pen. Code, § 290.013, subd. (a).) Defendant then argues the statute is ambiguous "because the provision seemingly states that the registrant's requirement arises when he 'changes his address' which presupposes that [he] has actually moved. Yet, the statute then continues, that the registrant must notify the last registering agency within five days of the move, in writing. This portion is subject to different interpretations, both making compliance unlikely, if not impossible. One interpretation is that the registrant must [move], then return to the [last] jurisdiction . . . and inform them of the move. The other interpretation, suggests that the

"(b) If the person does not know the new residence address or location at the time of the move, the registrant shall, in person, within five working days of the move, inform the last registering agency or agencies that he or she is moving. The person shall later notify the last registering agency or agencies, in writing, sent by certified or registered mail, of the new address or location within five working days of moving into the new residence address or location, whether temporary or permanent.

duty to inform the last registering agency of the move arises *prior* to the actual change of address, in contradiction to the first qualifying provision, 'who changes his or her residence address,' thus requiring notification of a change of address before the change of address actually occurs."

We disagree that two semantically plausible readings of the statute exist. Defendant's interpretation that requires a person to notify the last agency *before* the change of address is, as he himself states, contradicted by the statute.

It is true that the statute requires the notification of a move to a known address to be made in person, so that a person moving to a known address cannot simply mail back a form. (Cf. *People v. Smith, supra*, 32 Cal.4th 792, 797-801 [statute that required registrant to "inform, in writing" of a change of address allowed a registrant to mail the form].) But, as in this case, it is common for people to know where they are moving to, and in such cases the person may make the notification first, to avoid having to come back. In any event, after moving to Olivehurst, defendant had five working days to return to Sacramento to make the required notification. While defendant correctly points out that returning to make the notification in person may present logistical difficulties where a registered sex offender has chosen to move far away, that does not make the statutory duty *vague*.

And if a person does not know exactly where he or she is moving, he or she must so notify the last agency in person within five days of moving, and then when a new address is

obtained, may use certified or registered mail to send back that information. (Pen. Code, § 290.013, subd. (b).) This statutory requirement, too, is not vague, although, as the People note, that part of the statute is not implicated by the facts of this case. (See Part IIC.)

Defendant suggests that because the October 10 form incorrectly stated he had to tell the last agency *before* he moved, that he could not have known what his registration duty was. This claim does not show the statute is vague, either on its face or as applied, it shows that the agency that drafted the notification form made a mistake.

DISPOSITION

The judgment is affirmed.

ROBIE, J.

We concur:

BLEASE, Acting P. J.

CANTIL-SAKAUYE, J.